No. 18.

No. 18. October Term, 1897.

Filed Oct. 12, 1897.

IN THE

Supreme Court of the United States.

Lewis Miller, Plaintiff in Error,

vs.

The Cornwall Railroad Company, Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

WAYNE MacVEAGH,
HOWARD C. SHIRK,
Counsel for Defendant in Error.

Allen, Lane & Scott, Prs., Phila.

In the Supreme Court of the United States.

Lewis Miller, Plaintiff in Error,	
vs.	October Term, 1897.
The Cornwall Railroad Company, Defendant in Error.	No. 18.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

This record presents for the consideration and decision of this court two distinct questions, and only those two questions. Does the Act of the Legislature of Pennsylvania of April 4th, 1868, contravene the Constitution of the United States? And this question is divided by the counsel for the plaintiff in error into two: Does it contravene the Constitution of the United States by refusing to the persons falling within its provisions the equal protection of the laws; and if not, does it deny to such persons due process of law?

The language of the Act is as follows:—

"When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, or premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be only such as would exist if such person were an employee: *Provided*, That this section shall not apply to passengers."

It is not seriously contended by the counsel for the plaintiff in error that their client does not distinctly and unequivocally come within both the spirit and the words of this legislation; but if such contention had been seriously advanced it would

be overwhelmingly disproved by the facts established at the trial and contained in the evidence. That evidence established that near the city of Lebanon, in Pennsylvania, there are iron furnaces, from which extends the railroad of the defendant in error to the Cornwall ore banks, whence ore is obtained and shipped over said railroad to said furnaces. The proprietors of the furnaces had been for more than twenty years obtaining ore for their furnaces from these ore banks by way of the railroad of the defendant in error under an agreement requiring them to furnish their own cars and a man to take charge of them. The plaintiff in error was employed by the owners of the furnaces, in pursuance of this agreement, to take charge of the cars they supplied for the carriage of the ore from the ore banks to the furnaces. His duties were, as the evidence clearly establishes, to take charge of the cars at the furnaces, to oil and repair them as they needed it, to go with them from the furnaces to and over the railroad of the defendant in error, and see that they got to the ore banks where they were to be loaded with ore; and his duties then continued in the same degree upon their return journey, when thus loaded, to the furnaces.

On page 22 of the transcript of record, the plaintiff in error testified as follows:—

Q. You say you have been twenty-four years railroading?

A. Yes, sir.

Q. Where were you railroading these twenty-four years?

A. I was railroading some twenty years over the Cornwall road and awhile on the Philadelphia and Reading.

Q. By whom were you employed during these twenty years; you were employed over the Cornwall railroad, by whom?

A. By Coleman.

Q. Doing what?

A. Tending to the cars, taking them over to the Cornwall road, and having them sent out to Cornwall for ore; they were running the ore cars.

Q. You were running the ore cars of Coleman & Brock at the furnaces, weren't you?

A. No; the cars ran me after I was on the Cornwall road.

Q. You ran the cars off down into the yard?

A. I was there to run them on the Cornwall branch and they had to take them to the iron hill.

Q. Didn't you carry them right down over the Cornwall Railroad?

A. I ran them down to whatever the train was that was lying there to receive them; I ran them in the yard to whatever train was ready to receive my cars.

Q. You ran them from North Lebanon furnaces, from the Cornwall Railroad down over the Valley branch into the yard on the Cornwall Railroad?

A. Yes; into the yard, up to the train.

Q. So they were attached to the regular train and carried to Cornwall, weren't they?

A. Yes; attached to the train there.

Q. Run onto the anthracite siding, weren't they?

A. That was different—sometimes on that one and sometimes on the other; I couldn't testify to that.

Q. You accompanied the cars, didn't you?

A. The cars more accompanied me; I was sitting on them.

Q. As a matter of fact you sat in the cars and rode from Lebanon to Cornwall, didn't you?

A. Sometimes I rode down——

Q. You were sent really in your own cars?

A. Sometimes I rode on mine and sometimes on somebody else's.

Q. As a rule you occupied your own cars, didn't you?

A. Most times I did; I preferred my own.

Q. And broke on those cars?

A. I had no need braking.

Q. As a matter of fact, didn't you brake on those cars?

A. I had no need to brake.

Q. Question repeated.

A. Sometimes I did.

Q. When the engineer called for brakes, didn't you join with the other brakemen and brake?

A. That was how I felt; I had no need of doing it; I did it sometimes.

Q. When the cars got out of repair who reported them to the firm—to the North Lebanon Furnace Company?

A. I was the man to repair them when they got out of repair; I put them in repair when I could.

Q. Whenever any accident occurred, you were the man to repair them, weren't you?

A. Yes, when any accident occurred on the road to them, sometimes, what I could do I did.

Q. Your duty was to go with your empty cars and see to the loading of the ore, was it not?

A. My duty was to go along with the cars and see that they got to the ore company.

Q. And when anything got out of repair your duty was to repair it, if you could?

A. It might, what I could; but my duty—I didn't repair nothing along the line; what was broke along the line I hadn't anything to do with repairing.

Q. If anything got out of fix, was it your duty to put it in fix?

A. When it was a little thing that I could do, I did it. It was not my duty to see along the Cornwall Road. I couldn't make any repairs with the hand; I had no tools. I pushed packing in the boxes; I did that, or put a little oil in sometimes. Such repairs I did; it was my duty.

Q. And that duty you performed where you could on the road, and where you couldn't do it there you did it at home?

A. Yes; I done it sometimes along the road.

On page 31 of the transcript of record, Elmer Bluntz, a witness called for the plaintiff in error, testified as follows:—

Q. You were in the accident—you were hurt?

A. Yes, sir.

Q. What was Lewis Miller doing on that train?

A. Well, tending to his cars, as far as I know.

Q. Tending to what cars?

A. The North Lebanon ore cars.

Q. Tending to the cars?

A. Yes.

Q. What was he doing on that railroad; what was his position on the railroad?

COLONEL SELTZER:—That is, if you know; if you don't know, say you don't know.

A. I seen him repairing the cars; seen him fixing the cars if anything was wrong with them.

Q. Did you see him bring the cars down from the North Lebanon Furnaces?

A. Yes, sir.

Q. Did you see him braking?

A. I did see him braking a little bit.

It will be seen from this testimony how clearly and explicitly the plaintiff in error was, on the morning of October 16th, 1890, occupying precisely the position described in the Act of Assembly of April 4th, 1868. He sustained personal injury while lawfully engaged or employed on or about the road of the railroad company, and in or about a train or car thereon, of which railroad company he was not an employee. In other words, twenty-two years after this Act of Assembly was enacted, the plaintiff in error voluntarily placed himself exactly in the position described by it. It is now claimed that he is not to be treated as having done so, because the Commonwealth of Pennsylvania was not entitled to declare that any person thereafter voluntarily assuming such a position must, in the interest of the general welfare, be held to occupy the same position as if he were in the employ of the railroad company itself. It is not open to assertion that this statute conflicts with any of the generous and comprehensive provisions of the Bill of Rights in the Constitution of Pennsylvania. That question was distinctly raised and distinctly decided by the Supreme Court of the State in the case of Kirby *vs.* Pennsylvania Railroad Company, 76 Penn. Rep., 507. In making that decision the court says:—

"The relation he," that is, the plaintiff in error in this case, "assumes is one of danger, and the fact of danger authorizes the regulation by the State, as the conservator of the lives, security, and property of its citizens. The Act is a police regulation which, having respect for the general good, forbids individuals from undertaking a dangerous employment except at their own risk, to the same extent as if they were in the immediate employment of the railroad company."

In other words, the legislature believed it was for the public interest that whoever was lawfully engaged upon a railroad

train must be held to the same measure of responsibility for the negligence of any other person lawfully engaged upon the same train as if he was technically employed by the railroad company itself.

In Pennsylvania especially the custom long prevailed, even upon its main railroads, of shippers furnishing their own cars and persons to ride upon and attend to them, which cars formed part of a train moved by the railroad company from one point to another. The Act in question was passed simply to destroy the technical distinction that the person in charge of such cars was not an employee of the railroad company, while its own employees, in charge of other cars upon the same train, were such employees, and that the measure of responsibility for diligence, foresight, and care imposed upon the employee of the railroad company ought, in the public interest, to be imposed to exactly the same extent, and no more, upon the employee of the private shipper who was in attendance upon the cars of such shipper. It is not easy to see how the practical wisdom and propriety of such an enactment can be successfully assailed, for whoever does not care to be subject to its terms need not assume the position it describes; but even if this court should be of opinion that the legislation in question was unwise, which is not apprehended for a moment, it remains equally difficult to see how the discretion upon the subject lodged in the Legislature of Pennsylvania can be transferred to this tribunal. It may be admitted that the Fourteenth Amendment to the Constitution of the United States was not only advisable, but in many respects necessary to complete the system of government under which we live, and to secure to the citizens of each State the same general measure of rights and liberties as are accorded to the citizens of any other State; but that such a statute as is now in question either denies to the persons who see fit to place themselves within its terms either the equal protection of the laws or due process of law, it is not easy to discover. The learned and exhaustive argument of counsel for the plaintiff in error presents, it may be frankly admitted, every possible point of view in support of their contention, and they have cited every decision which they be-

lieved themselves able to represent as favorable to them; but there is no decision of this court or of any other court, so far as can be ascertained, which gives the slightest countenance to the proposition they present with such labor and acumen.

They quote the language of this court in United States *vs.* Cruikshank, 92 U. S., 555, as supporting their view: "The equality of the rights of citizens is a principle of republicanism; every republican government is in duty bound to protect all its citizens in the enjoyment of that liberty, if possible." Now the Act in question simply abolishes a technical distinction between the plaintiff in error riding upon, attending to, and braking some of the cars in the train, with another person standing upon, attending to, and braking other cars in the same train; so that, so far from contravening, it distinctly supports the doctrine of the equality of the rights of citizens.

They also quote the language of the Supreme Court of Pennsylvania in Bagg's Appeal, 43 Penn. Rep., 512. "There is nothing plainer in the Bill of Rights than the principle that all men must stand on an equality before the judicial tribunal, and they do not stand so if the judiciary is bound to admit an inequality accorded by a legislative decree by which a statute of limitation or any other element of the remedy is set aside or altered for any particular case or person so as to affect the right. * * * Equality of administration is a large and essential element of justice. * * * That legislation cannot be passed that gives opposite rules for distinct cases in the same class; that excludes any case from the class to which it naturally belongs, and says to persons in general you shall have the protection that naturally arises from the lapse of time, and to some particular person he shall not have it; this is nothing like the due course of law." Now the object of the statute assailed by the counsel for the plaintiff in error was not to create but to remedy such an equality as is criticised in this decision. No reason whatever can be offered why of two persons lawfully engaged in the movement of the same train upon the same railroad a certain measure of responsibility or of privilege shall be imposed upon or accorded to the one and a wholly different measure be accorded to

or imposed upon the other, and the object of the Act of Assembly in question was simply to secure equality as between two persons occupying in all essential respects precisely the same position. The counsel for the plaintiff in error, in support of their contention that the Act of April 8th, 1868, violates that provision of the Fourteenth Amendment which prohibits any legislature from withholding from any citizen due process of law, quotes the language of the Supreme Court of Alabama in Ziegler *vs.* S. & N. Alabama Railroad Company, 58 Ala. Rep., 599. "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting or proving every material fact which bears on the question of right in the matter involved."

And they have also quoted the language of the Supreme Court of Pennsylvania in Norman *vs.* Heise, 5 Watts & Sergeant, 171. As to what is due process of law, Chief Justice Gibbon uses this language: "What law? Undoubtedly a pre-existent rule of conduct, not an *ex post facto* rescript or decree made for the occasion." Now the Act of Assembly assailed in this case has no resemblance whatever to the evils against which these decisions are aimed. On the contrary, it meets every requirement of the definition of a pre-existent rule of conduct, general in its operation, and designed to remove an inequality of a wholly technical nature, the continuance of which in the body of the law was calculated to increase the danger to all persons engaged in the common employment as well as to others liable to be affected by their negligence.

It is therefore confidently submitted that it is not open either to the allegation that it contravenes any provisions of the Federal Constitution or any principle of general justice and equity.

HOWARD C. SHIRK,
WAYNE MacVEAGH,
Counsel for the Defendant in Error.